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10 **UNITED STATES DISTRICT COURT**

11 **NORTHERN DISTRICT OF CALIFORNIA**

12 **KLAMATH RIVERKEEPER**, a nonprofit  
 13 public benefit corporation; **HOWARD**  
**McCONNELL**; **LEAF G. HILLMAN**;  
**ROBERT ATTEBERY**; and  
**BLYTHE REIS**;

14 Plaintiffs,  
 15

v.

16 **PACIFICORP, INC.**, an Oregon  
 17 Corporation;

18 Defendant.  
 19

CASE NO.: C 07-06199 WHA

**DEFENDANT PACIFICORP'S NOTICE OF  
MOTION AND MOTION TO DISMISS  
DUPLICATIVE SUIT; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Date: January 24, 2008  
 Time: 8:00 a.m.  
 Place: Courtroom 9, 19<sup>th</sup> Floor

Judge: Hon. William H. Alsup

## **NOTICE OF MOTION**

PLEASE TAKE NOTICE that on January 24, 2008, at 8:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 9, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable William H. Alsup, Defendant PacifiCorp will move the Court for the dismissal of Plaintiffs' Complaint with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6), or for other appropriate relief.

This motion is based on the Federal Rules of Civil Procedure, the pleadings and records on file herein, PacifiCorp's Request for Judicial Notice filed herewith, the pleadings and records on file in *McConnell v. PacifiCorp, Inc.*, No. C-07-02382 WHA (N.D. Cal.), and the Memorandum of Points and Authorities set forth below.

**RELIEF REQUESTED**

PaciCorp seeks dismissal of Plaintiffs' Complaint with prejudice.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

The Court already is well-familiar with the issues raised in this “new” Complaint, as they are the very same issues previously raised by the same Plaintiffs in a pending action before this Court, captioned *McConnell v. PacifiCorp, Inc.*, No. C-07-02382 WHA (N.D. Cal.) (“*McConnell* case”).<sup>1</sup> In fact, all of the Plaintiffs here admit that they are also Plaintiffs in *McConnell*, and that the two cases arise out of the same factual events. RJN, Ex. 2. But, because Plaintiffs already filed *McConnell*, filing this duplicative case is forbidden: “Plaintiffs generally have no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant.” *Adams v. Cal. Dep’t of Health Servs.*, 487 F.3d 684, 688 (9th Cir.) (citations omitted), *cert. denied*, 76 U.S.L.W. 3303 (U.S. Dec. 10, 2007) (No. 07-467).

13                   What the Plaintiffs fail to report is that they had previously advised the Court that  
14 they would amend the *McConnell* complaint to add the present cause of action, that they  
15 knowingly failed to do so before the Court’s September 27, 2007, amendment deadline, and that  
16 they are now attempting to cure their failure to timely amend and side-step the Court’s Case  
17 Management Order in *McConnell* by filing this “new” but duplicative Complaint.

The two Complaints are similar indeed: The Plaintiffs are once again alleging that the Project causes or contributes to poor water quality conditions—particularly, blooms of *Microcystis aeruginosa* (“blue-green algae”)—in the Copco and Iron Gate Reservoirs and downstream, that they claim are harmful to humans and anadromous fish. The “new” Complaint (the “*Riverkeeper* Complaint”) relies on the same facts as *McConnell* to assert a claim pursuant to the Federal Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq. (also known as the Resource Conservation and Recovery Act or “RCRA”), the federal statute that regulates the land disposal

<sup>1</sup> Defendant PacifiCorp's Request for Judicial Notice ("RJN"), Ex. 1 (*McConnell* Complaint).

1 and management of solid and hazardous wastes,<sup>2</sup> claiming that the naturally occurring blue green  
 2 algae that sometimes proliferates in the Project's reservoirs (and elsewhere in waters throughout  
 3 the State and the world) in summer months is a "solid waste" or a "hazardous waste" that  
 4 PacifiCorp is improperly "disposing" by allowing it to pass through PacifiCorp's hydroelectric  
 5 dams.

6 The only surprise about the *Riverkeeper* Complaint is that it is being filed now.  
 7 As the Plaintiffs stated months ago in the *McConnell* Joint Case Management Statement: "On  
 8 June 27, 2007, Plaintiffs sent PacifiCorp a notice of intent to sue," the *McConnell* Plaintiffs  
 9 "intend to seek leave of this Court to amend their complaint to assert a claim under the Federal  
 10 Solid Waste Disposal Act," and such "claim will ripen on September 27, 2007." RJN, Ex. 3.  
 11 This Court knowingly set a deadline of September 27, 2007, in the Court's *McConnell* Case  
 12 Management Order ("CMO"), for the *McConnell* Plaintiffs to seek that pleading amendment.  
 13 RJN, Ex. 4.

14 The *McConnell* Plaintiffs failed to comply with the Court's CMO. Instead, seven  
 15 months after filing the *McConnell* action, and nearly six months after noticing their intent to sue,  
 16 most of the *McConnell* Plaintiffs now seek to circumvent the Court's *McConnell* CMO by filing  
 17 what was to be an amendment to their *McConnell* Complaint as a new civil action against the  
 18 same defendant in the same court. As a separate action, the *Riverkeeper* case is wholly  
 19 duplicative of the *McConnell* case, a case that PacifiCorp has been diligently litigating pursuant  
 20 to the Court's CMO for the past four-and-a-half months.

21 Because the *Riverkeeper* case violates the rule against claim-splitting, and because  
 22 allowing it to proceed would subject PacifiCorp to more "vexatious and expensive litigation" than  
 23 it is already faced with, it should be dismissed with prejudice. *See Adams*, 487 F.3d at 693.

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25           2 As the Second Circuit wrote: "When congress enacted RCRA in 1976, it sought to close 'the  
 26 last remaining loophole in environmental law, that of unregulated land disposal of discarded  
 27 materials and hazardous waste.'" *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir.  
 1991) (citing H.R. Rep. No. 94-1491, at 4 (1976), 1976 U.S.C.C.A.N. 6238, 6241), *rev'd in  
 part on other grounds*, 505 U.S. 555 (1992). RCRA is not a law intended to regulate water  
 quality issues.

1       **II. STATEMENT OF FACTS**

2       **A. McConnell Case History**

3                  On May 2, 2007, eight plaintiffs (Howard McConnell, Leaf G. Hillman, Robert  
 4 Attebery, Frankie Joe Myers, Terance J. Supahan, Michael T. Hudson, Blythe Reis, and Klamath  
 5 Riverkeeper) filed the *McConnell* Complaint against PacifiCorp alleging that the Project causes  
 6 or contributes to poor water quality conditions—particularly, blooms of blue-green algae—in the  
 7 Copco and Iron Gate Reservoirs and downstream, that they claim are harmful to humans and  
 8 anadromous fish, and asserting statutory (California Business & Professions Code section 17200)  
 9 and common law (private nuisance—continuing and permanent; public nuisance—continuing  
 10 and permanent; trespass; and negligence) causes of action to remedy the alleged harms. *See*  
 11 RJN, Ex. 1 (*McConnell* Complaint, Docket No. 1). The *McConnell* Plaintiffs requested  
 12 compensatory and punitive damages and injunctive relief. *Id.*

13                  PacifiCorp filed a motion to dismiss Plaintiffs' claims for injunctive relief, and a  
 14 motion to stay Plaintiffs' claims for damages pending the completion of FERC relicensing  
 15 proceedings related to the Project. The Court granted PacifiCorp's motion to dismiss Plaintiffs'  
 16 claims for injunctive relief and denied PacifiCorp's motion to stay the damages claims on August  
 17 16, 2007. *See* RJN, Ex. 5 (*McConnell* Order, Docket No. 49).

18                  On the same day, the Court held a Case Management Conference (“CMC”). Prior  
 19 to the conference, the parties submitted a Joint CMC Statement. RJN, Ex. 3 (*McConnell* Joint  
 20 CMC Statement, Docket No. 44). Of particular relevance here, in the Joint CMC Statement,  
 21 *McConnell* Plaintiffs stated:

22                  Plaintiffs intend to seek leave of this Court to amend their complaint to assert  
 23 a claim under the Federal Solid Waste Disposal Act (also known as the  
 24 Resource Conservation and Recovery Act” or “RCRA”), 42 U.S.C. § 6901 *et seq.* On June 27, 2007, Plaintiffs sent PacifiCorp a notice of intent to sue  
 25 based on PacifiCorp’s “contributing to the past or present handling, storage,  
 26 treatment, transportation, or disposal of any solid or hazardous waste which  
 27 may present an imminent and substantial endangerment to health or the  
 28 environment” (42 U.S.C. § 6972(a)(1)(B)). That claim will ripen on  
 September 27, 2007.

27                  *Id.* at 10. During the CMC, and in the August 16, 2007, Case Management Order (“*McConnell*  
 28 CMO”), the Court provided that leave to make pleading amendments in the *McConnell* case

1 could have been sought up through and including September 27, 2007, the exact date Plaintiffs  
 2 determined their claim pursuant to RCRA ripened. RJD, Ex. 4 (*McConnell* CMO, Docket No.  
 3 48) at 1.

4 The *McConnell* Plaintiffs never sought leave to amend their Complaint. RJD, Ex.  
 5 6 (*McConnell* case Docket). Written discovery is well underway.

6 **B. *Riverkeeper* Case History**

7 On December 6, 2007, five of the eight *McConnell* Plaintiffs (Klamath  
 8 Riverkeeper; Howard McConnell; Leaf G. Hillman; Robert Attebery; and Blythe Reis) filed the  
 9 instant action, the *Riverkeeper* case, in the Northern District. Complaint, *Klamath Riverkeeper v.*  
 10 *PacifiCorp, Inc.*, No. CV-07-06199 WHA (N.D. Cal. Dec. 6, 2007). The factual allegations of  
 11 the *Riverkeeper* Complaint are strikingly similar to those of the *McConnell* Complaint. Compare  
 12 *McConnell* Complaint, ¶¶ 1-7; 23-79 with *Riverkeeper* Complaint, ¶¶ 1-8; 30-78. Just as in the  
 13 *McConnell* case, Plaintiffs in the *Riverkeeper* case allege that the Project causes or contributes to  
 14 poor water quality conditions—particularly, blooms of blue-green algae—in the Copco and Iron  
 15 Gate Reservoirs and downstream, that are harmful to humans and anadromous fish. See, e.g.,  
 16 *Riverkeeper* Complaint, ¶¶ 30-33.

17 Indeed, *McConnell* Plaintiffs admit that “the harm giving rise to the claims in both  
 18 cases stems from the same factual events” and that there is “commonality of the essential  
 19 underlying facts in each case.” See RJD, Ex. 2 (*McConnell* Administrative Motion, Docket No.  
 20 60) (herein “*McConnell* Related Case Motion”) at 1-2. The *Riverkeeper* case ties these same  
 21 *McConnell* factual allegations to a new legal theory, one pursuant to the citizen suit provision of  
 22 RCRA. See *Riverkeeper* Complaint. This Court determined that the *Riverkeeper* case is related  
 23 to the *McConnell* case on December 17, 2007. See RJD, Ex. 7 (Related Case Order, *McConnell*  
 24 Docket No. 61).

25 Even though the *Riverkeeper* Complaint was only just filed, Plaintiffs have known  
 26 about, and purportedly intended to bring, the RCRA claim since, at the latest, June 27, 2007,  
 27 when they sent PacifiCorp a notice of their intent to assert a claim pursuant to RCRA. See RJD,  
 28 Ex. 3 (*McConnell* Joint CMC Statement) at 10. Nonetheless, Plaintiffs missed their deadline to

1 amend their *McConnell* Complaint, then waited another two and a half months, and finally filed  
 2 the *Riverkeeper* case as a new, separate action in the Northern District on December 6, 2007.

3 **III. ISSUE TO BE DECIDED**

4 Pursuant to Civ. L.R. 7-4(a)(3), the issue to be decided is: Whether Plaintiffs'  
 5 *Riverkeeper* Complaint, which alleges that PacifiCorp's Klamath River Project causes or  
 6 contributes to poor water quality conditions that are harmful to humans and anadromous fish, is  
 7 duplicative of Plaintiffs' *McConnell* Complaint, which alleges that PacifiCorp's Klamath River  
 8 Project causes or contributes to poor water quality conditions that are harmful to humans and  
 9 anadromous fish, and thus should be dismissed for violating the rule against claim-splitting.

10 **IV. ARGUMENT**

11 This motion is brought as a motion to dismiss for failure to state a claim upon  
 12 which relief can be granted under Federal Rule of Civil Procedure ("FRCP") 12(b)(6), or for  
 13 other relief that the Court deems appropriate. "District courts retain broad discretion to control  
 14 their dockets and in the exercise of that power they may impose sanctions including, where  
 15 appropriate, default or dismissal." *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 688 (9th  
 16 Cir.) (citations omitted), *cert. denied*, 76 U.S.L.W. 3303 (U.S. Dec. 10, 2007) (No. 07-467).

17 **A. The *Riverkeeper* Case Is Duplicative Of The *McConnell* Case And Thus  
 18 Violates The Rule Against Claim-Splitting**

19 *McConnell* Plaintiffs were "required to bring at one time all of the claims against  
 20 [PacifiCorp or its privies] relating to the same transaction or event" because "Plaintiffs generally  
 21 have no right to maintain two separate actions involving the same subject matter at the same time  
 22 in the same court and against the same defendant." *Adams*, 487 F.3d at 688, 693 (citations  
 23 omitted). The "main purpose behind the rule preventing claim splitting is 'to protect the  
 24 defendant from being harassed by repetitive actions based on the same claim.'" *Clements v.*  
 25 *Airport Auth.*, 69 F.3d 321, 328 (9th Cir. 1995) (citing Restatement (Second) of Judgments § 26  
 26 cmt. a (1982)).

27 "To determine whether a suit is duplicative" and thus violates the rule against  
 28 claim-splitting, the Ninth Circuit "borrow[s] from the test for claim preclusion" and "examine

1 whether [1] the causes of action and the relief sought, as well as [2] the parties or privies to the  
 2 action, are the same.” *Adams*, 487 F.3d at 688-89 (quoting *Hartsel Springs Ranch of Colo., Inc.*  
 3 v. *Bluegreen Corp.*, 296 F.3d 987 n.1 (10th Cir. 2002) (“[I]n the claim-splitting context, the  
 4 appropriate inquiry is whether, assuming that the first suit were already final, the second suit  
 5 could be precluded pursuant to claim preclusion.”)); *see also Costantini v. Trans World Airlines*,  
 6 681 F.2d 1199, 1201 (9th Cir. 1982) (“[T]he doctrine of res judicata (or claim preclusion) bars  
 7 all grounds for recovery which could have been asserted, whether they were or not, in a prior suit  
 8 between the same parties . . . on the same cause of action.”) (citations omitted).

9 Plaintiffs have no right to maintain the *Riverkeeper* suit, a separate action that is  
 10 entirely duplicative of Plaintiffs’ *McConnell* suit against PacifiCorp.

11 **1. The *McConnell* Complaint And The *Riverkeeper* Complaint Assert  
 12 The Same Causes Of Action And Seek The Same Relief**

13 “To ascertain whether successive causes of action are the same,” the Ninth Circuit  
 14 uses the “transaction test.” *Adams*, 487 F.3d at 689. “Whether two events are part of the same  
 15 transaction or series depends on whether they are related to the same set of facts and whether  
 16 they could conveniently be tried together.” *Id.* (citations omitted). In applying the transaction  
 17 test, the Ninth Circuit examines four criteria:

- 18 (1) whether rights or interests established in the prior judgment would be  
     destroyed or impaired by prosecution of the second action
- 19 (2) whether substantially the same evidence is presented in the two actions;
- 20 (3) whether the two suits involve infringement of the same rights; and
- 21 (4) whether the two suits arise out of the same transactional nucleus of facts.

22 *Id.* (citing *Costantini*, 681 F.2d at 1201-02). “The last of these criteria”—whether the two suits  
 23 arise out of the same transactional nucleus of facts—is the most important.” *Adams*, 487 F.3d  
 24 at 689 (quoting *Costantini*, 681 F.2d at 1202); *see also Owens v. Kaiser Found. Health Plan*,  
 25 *Inc.*, 244 F.3d 708 (9th Cir. 2001) (“The central criterion in determining whether there is an  
 26 identity of claims between the first and second adjudications is whether the two suits arise out of  
 27 the same transactional nucleus of facts.”) (citations omitted). Indeed, the Ninth Circuit “has  
 28 often held the common nucleus criterion to be outcome determinative.” *Mpoyo v. Litton Electro-*

1     *Optical Sys.*, 430 F.3d 985, 987-88 (9th Cir. 2005) (holding that res judicata principles barred a  
 2     subsequent action even though the “other criteria do not as clearly counsel” whether the suits  
 3     arise out of the same claim, because the common nucleus of operative fact criterion “controls and  
 4     assures the two suits involve the same claim or cause of action”) (citing *Int’l Union v. Karr*, 994  
 5     F.2d 1426, 1429-30 (9th Cir. 1993) (finding the common nucleus criterion outcome  
 6     determinative and listing cases using it as the exclusive factor to bar a second claim under res  
 7     judicata)).

8                 Thus, taking the last and most important criterion first, the *McConnell* case and  
 9     the *Riverkeeper* case arise out of the exact same transactional nucleus of (alleged) facts: that the  
 10   Project causes or contributes to poor water quality conditions—particularly, blooms of blue-  
 11   green algae—in the Copco and Iron Gate Reservoirs and downstream, that are harmful to  
 12   humans and anadromous fish. *See, e.g., McConnell* Complaint, ¶¶ 23-25; *Riverkeeper*  
 13   Complaint, ¶¶ 30-33. *McConnell* Plaintiffs admit that the two cases “concern the same  
 14   transaction or events” and that the “harm giving rise to the claims in both cases stems from the  
 15   same factual events.” RJN, Ex. 2 (*McConnell* Related Case Motion) at 1.

16                 Indeed, the Statement of Facts sections in the *McConnell* Complaint and the  
 17   *Riverkeeper* Complaint are nearly identical. Comparing the *McConnell* and *Riverkeeper*  
 18   Complaints side-by-side demonstrates that, apart from several paragraphs of necessary “new”  
 19   allegations that PacifiCorp’s operation of the Project causes or contributes to “solid waste”  
 20   generation, storage, handling and disposal,<sup>3</sup> the forty-eight-paragraph Statement of Facts in the  
 21   *Riverkeeper* Complaint is a virtual wholesale lifting of the facts alleged in the *McConnell*  
 22   Complaint. *See Baker v. Voith Fabrics U.S. Sales, Inc.*, No. 07-003, 2007 WL 1549919, at \*1  
 23   (E.D. Wash. May 24, 2007) (“While the claims are different than those brought in the prior  
 24   action, the facts alleged in each complaint are nearly identical, as evidenced by the following  
 25   side-by-side comparison of the Statement of Facts.”). Re-alleging the same *McConnell* facts and

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26  
 27                 <sup>3</sup> Even these allegations aren’t so much ”new” as they are attempts to recast *McConnell*’s  
 28     allegations about blooms of blue-green algae to fit Plaintiffs’ new legal theory.

1 stating a new legal theory in the *Riverkeeper* Complaint is not stating a new “claim” for purposes  
 2 of res judicata, but rather amounts to improper claim-splitting. *See id.*

3 The remaining “transaction test” criteria also weigh in favor of a finding that the  
 4 *Riverkeeper* suit arises out of the same transaction and is thus the “same” as the claims raised in  
 5 the *McConnell* case. First, the “rights or interests” that will be established in the *McConnell* case  
 6 could “be destroyed or impaired” by prosecution of the *Riverkeeper* action. PacifiCorp’s  
 7 responsibility, or lack thereof, for allegedly causing or contributing to the blooms of blue-green  
 8 algae will be determined in *McConnell* and would again be determined in *Riverkeeper*. *See*  
 9 *Costantini*, 681 F.2d at 1202.

10 Second, there can be no doubt that “substantially the same evidence” would be  
 11 presented in the *Riverkeeper* case and the *McConnell* case. The evidence in both cases will focus  
 12 on expert opinion and analyses regarding the presence, causes and effects of blue-green algae in  
 13 the Klamath River. As *McConnell* Plaintiffs explain:

14 Whether *Microcystis aeruginosa* and microcystin toxin are pollutants causing  
 15 environmental degradation that is harming Plaintiffs is the central factual issue  
 16 in each case. Thus, the Judge in each case will be presented with substantially  
 17 similar information on these pollutants. The Judge will be called upon to  
 18 understand the scientific data and information related to *Microcystis*  
*aeruginosa* and microcystin toxin. Further, the Judge will be called upon to  
 19 evaluate the effects of *Microcystis aeruginosa* and microcystin toxin on both  
 20 human health and the environment. It would conserve judicial resources to  
 21 have only one Judge hear the factual evidence that will be presented in these  
 22 two cases.

23 RJN, Ex. 2 (*McConnell* Related Case Motion) at 2-3. Moreover, “the factual issues are so  
 24 closely related that a factual determination in one case may conflict with a factual determination  
 25 in the second case.” *Id.* at 3. While evidence related to the *McConnell* Plaintiffs’ ownership  
 26 interests in land adjacent to the Klamath River and fishing practices may be at issue only in the  
 27 *McConnell* case, and there would undoubtedly be additional factual nuances injected by addition  
 28 of the RCRA claims, the bulk of evidence in both would relate to the presence, causes, and  
 29 effects of blue-green algae.

30 Third, in large part, the two suits involve “infringement of the same rights.” In  
 31 both suits, Plaintiffs allege that their (and the public’s) right to a clean, healthy Klamath River

1 environment has been infringed by PacifiCorp's operation of the Project and seek to recover  
 2 monetary and injunctive relief. While some *McConnell* Plaintiffs also allege infringement of  
 3 their private property rights, the majority of the *McConnell* allegations focus on harm to the  
 4 Klamath River environment, just as in the *Riverkeeper* case.

5 Moreover, the fact that the *McConnell* case states causes of action arising under  
 6 state common law, and the *Riverkeeper* case states a cause of action arising under federal  
 7 statutory law, does nothing to negate the fact that these two suits state the same "claim" arising  
 8 out of the same transactional nucleus of facts for purposes of the res judicata and claim-splitting  
 9 doctrines. *See, e.g., Adams*, 487 F.3d at 691 (holding that second action stating claims pursuant  
 10 to the federal Fair Credit Reporting Act and California Investigative Consumer Reporting Act  
 11 was duplicative of earlier action stating claims in negligence and breach of contract); *Owens*, 244  
 12 F.3d at 715 (holding that an earlier suit raising state law claims based on wrongful termination  
 13 and breach of contract barred a later suit under Title VII based on the same transactional nucleus  
 14 of facts); *First Pac. Bancorp, Inc. v. Helper*, 224 F.3d 1117 (9th Cir. 2000) (holding that an  
 15 earlier private right of action under the Federal Deposit Insurance Act and state common law  
 16 claims filed in a subsequent action arose from the same transactional nucleus of facts and thus  
 17 the subsequent action was barred); *Davis v. Sun Oil Co.*, 148 F.3d 606 (6th Cir. 1998) (holding  
 18 that action under RCRA citizen suit provision (42 U.S.C. § 6972(a)(1)(B)) was duplicative of  
 19 and thus barred by earlier state court action alleging nuisance, breach of contract and fraud under  
 20 Ohio res judicata law).

21 Simply put, "[d]ifferent theories supporting the same claim for relief must be  
 22 brought in the initial action." *Mpoyo*, 430 F.3d at 988 (citations omitted); *see also Costantini*,  
 23 681 F.2d at 1202 (noting that "a mere change of legal theory does not imply a new cause of  
 24 action"). Each of the four "transaction test" factors weigh in favor of a finding that the  
 25 *Riverkeeper* suit is duplicative of the *McConnell* suit.

26 Finally, Plaintiffs seek "substantially the same relief in both actions": monetary  
 27 damages (general and punitive) and injunctive relief in *McConnell* and civil penalties and  
 28 injunctive relief in *Riverkeeper*. *See Adams*, 487 F.3d at 691. The civil penalties Plaintiffs seek

1 in the *Riverkeeper* case are “substantially the same” as the punitive damages sought in  
 2 *McConnell*—both remedies serve to deter unlawful conduct. *See Friends of the Earth, Inc. v.*  
 3 *Laidlaw Env'tl. Servs. Co.*, 528 U.S. 167, 186 (2000) (noting that civil penalties “encourage  
 4 defendants to discontinue current violations and deter them from committing future ones”); *Neal*  
 5 *v. Farmers Ins. Ex.*, 21 Cal. 3d 910, 928 n.13 (“The purpose of punitive damages is to punish  
 6 wrongdoers and thereby deter the commission of wrongful acts.”). In all, as *McConnell*  
 7 Plaintiffs admit, the two suits “concern the same transaction or events.” RJD, Ex. 2 (*McConnell*  
 8 Related Case Motion) at 1.

9                   **2. The Parties Are Substantially The Same In The *McConnell* Complaint  
 10 And The *Riverkeeper* Complaint.**

11                 Five of the eight *McConnell* Plaintiffs (Riverkeeper, McConnell, Hillman,  
 12 Attebery, and Reis) brought the *Riverkeeper* case against the same defendant, PacifiCorp. It is  
 13 not clear why *McConnell* Plaintiffs Hudson, Supahan and Myers chose not to join the  
 14 *Riverkeeper* suit. Nonetheless, all of the interests in the *Riverkeeper* suit are fully represented in  
 15 *McConnell*, and thus for claim-splitting purposes, as *McConnell* Plaintiffs admit, “[t]he actions  
 16 have the same parties.” RJD, Ex. 2 (*McConnell* Related Case Motion) at 1.

17                   **B. The *Riverkeeper* Complaint Should Be Dismissed With Prejudice**

18                 The Court has no discretion in finding a violation of the claim-splitting rule, as  
 19 *McConnell* Plaintiffs were “required to bring all of [their] claims against [PacifiCorp and its  
 20 privies] arising from a single cause of action in one suit”; the Court’s only discretion is in  
 21 choosing a remedy. *See Adams*, 487 F.3d at 688. “District courts retain broad discretion to  
 22 control their dockets and in the exercise of that power they may impose sanctions including,  
 23 where appropriate, default or dismissal.” *Id.* (citations omitted). “After weighing the equities of  
 24 the case, the district court may exercise its discretion to dismiss a duplicative later-filed action, to  
 25 stay that action pending resolution of the previously filed action, to enjoin the parties from  
 26 proceeding with it, or to consolidate both actions.” *Id.*

27                 In *Adams*, Plaintiff Adams first filed a suit in state court alleging various state and  
 28 federal legal theories related to employment retaliation against the California Department of

1 Health Services. *Id.* at 687. Adams' suit was removed to federal court, and the district court  
 2 issued a scheduling order setting March 26, 2004, as the deadline for filing motions to amend the  
 3 complaint or add additional parties. *Id.* Next, on July 1, 2004, "well past the March 26, 2004  
 4 deadline set in the scheduling order," Adams filed a motion for leave to amend her complaint to  
 5 add additional defendants and claims. *Id.* Adams' motion was denied for failure to demonstrate  
 6 good cause for undue delay in seeking leave to amend. *Id.* Seeking to get around that ruling, on  
 7 September 2, 2004, "after the district court denied her motion for leave to amend in the first  
 8 case," Adams filed her amendments as a complaint in a second case in the same court. *Id.* The  
 9 district court, weighing the equities of the case, dismissed with prejudice Adams' second suit as  
 10 duplicative of her first. *Id.* at 687-88.

11           The Ninth Circuit affirmed, finding that the district court did not abuse its  
 12 discretion in dismissing the duplicative suit with prejudice, and noting that "[d]ismissal of the  
 13 duplicative lawsuit, more so than the issuance of a stay or the enjoinder of proceedings,  
 14 promotes judicial economy and the comprehensive disposition of litigation. In dismissing the  
 15 duplicative suit with prejudice, the district court acted to protect the parties from vexatious and  
 16 expensive litigation and to serve the societal interest in bringing an end to disputes." *Id.* at 692-  
 17 93 (emphasis added) (citations omitted).

18           The equities of this case are nearly identical to those in *Adams*: As in *Adams*,  
 19 Plaintiffs had knowledge of the factual basis for the *Riverkeeper* suit when they filed *McConnell*.  
 20 However, five of the *McConnell* Plaintiffs, "in an attempt to avoid the consequences of [their]  
 21 own delay" and to circumvent the long-passed deadline set by the *McConnell* CMO for seeking  
 22 leave to amend, are now attempting to bring a separate suit for their *Riverkeeper* claim. *Id.* at  
 23 688. While the plaintiff in *Adams* first sought leave to amend in their first suit before filing a  
 24 second, duplicative suit, Plaintiffs here, after missing the Court's deadline for pleading  
 25 amendments under the more liberal standard of FRCP 15, did not even attempt to seek  
 26 amendment of their *McConnell* Complaint under the "good cause" standard of FRCP 16. Thus,  
 27 *McConnell* Plaintiffs are even less diligent than the *Adams* plaintiff, and the Court should not  
 28 hesitate to dismiss the *Riverkeeper* suit with prejudice.

Moreover, efficient case management counsels dismissal. In *McConnell*, the Court’s CMO set a deadline for requests to expand the scope of the *McConnell* case that meshed with other case management deadlines leading to trial beginning on December 1, 2008. To expand the *McConnell* case now, almost three months after the CMO’s deadline, would force at least PacifiCorp to promulgate additional written discovery and delay depositions to ensure coverage of Plaintiffs’ belated RCRA claim. Plaintiffs’ unwarranted delay should not impose additional costs on PacifiCorp or threaten *McConnell*’s existing case management schedule.

8               Thus, PacifiCorp respectfully submits that dismissal with prejudice is proper in  
9 this case, as it was in *Adams*. If the Court is nonetheless not inclined to dismiss the *Riverkeeper*  
10 Complaint outright, it should at least dismiss it without prejudice, so that Plaintiffs may (if they  
11 choose) file a proper motion for leave to amend their complaint in *McConnell* to add their RCRA  
12 claims. The other two options identified in *Adams*—a stay or consolidation—are inappropriate  
13 here: A stay would only compound the inefficiency Plaintiffs have caused. And where a Court  
14 has laid out a clear and orderly process for closing the pleadings—as this Court did in the  
15 *McConnell* CMO—it would be singularly inappropriate to simply cast that framework aside by  
16 consolidating a separate case that was transparently filed as a separate action to avoid that very  
17 framework. A dismissal without prejudice would at least vindicate the process established in the  
18 *McConnell* CMO, and (if the Plaintiffs so choose) allow the parties to address under FRCP 16  
19 whether there is any excuse for Plaintiffs’ delay in asserting their RCRA claims.

20 | Dated: December 20, 2007

Respectfully submitted,

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By: /s/

Richard W. Rauschenbush

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